Supreme Court, U.S.
FILED

98 1801 MAY 7 1999

OFFICE OF THE CLERK

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

BOBBY WAYNE SWISHER,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

---

PETITION FOR WRIT OF CERTIORARI

BARBARA K. KAGAN
Counsel of Record
LINDA S. STEIN
L. MATTHEW QUIGLEY
MELINEH B. BLACKWELL
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
(202) 429-3000
Counsel for Bobby Wayne Swisher

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

5988

QUESTION PRESENTED

1. Were Petitioner's rights under the Fourth and Fourteenth Amendments violated when Petitioner's consent to search occurred while Petitioner was in custody at the police station and had not given a "knowing and intelligent" waiver of his Fourth Amendment rights?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Statement Of Facts	2
B. Constitutional Issues Raised	5
REASONS FOR GRANTING THE WRIT	6
I. A "KNOWING AND INTELLIGENT WAIVER" STANDARD SHOULD BE APPLIED TO DETERMINE WHETHER CONSENT GIVEN BY AN INDIVIDUAL IN CUSTODY AT A POLICE STATION IS VOLUNTARY	6
A. *Schneckloth* And *Watson* Left Open This Important Question Of Federal Law	6
B. This Court Has Historically Recognized That There Is Compulsion Inherent In Police-Dominated Custodial Interrogations And Therefore Constitutional Safeguards Are Required	10
C. The Circuit Courts Have Applied Conflicting Standards To Determine Whether An Individual Has Given Voluntary Consent When In Custody At A Police Station	12

TABLE OF CONTENTS—Continued

Page

II. IN ANY EVENT, THE TRIAL COURT VIOLATED THIS COURT'S SETTLED FOURTH AMENDMENT PRECEDENT BY FAILING TO CONSIDER WHETHER PETITIONER WAS IN CUSTODY IN DETERMINING THE VOLUNTARINESS OF HIS CONSENT 15

CONCLUSION 17

APPENDIX

A. *Swisher v. Virginia*, 506 S.E.2d 763 (Va. 1998) 1a

B. The Virginia Supreme Court's Denial of Petitioner's Motion for Rehearing 22a

C. The District Court's Oral Decisions in Response to Petitioner's Suppression Motions 23a

D. Extension of Time for Petitioner to File Petition for a Writ of Certiorari 28a

E. Petitioner's Motion to Suppress 29a

F. Relevant Pages from Petitioner's Brief to Virginia Supreme Court 33a

TABLE OF AUTHORITIES

CASES	Page
Bumper v. North Carolina, 391 U.S. 543 (1968)	7
Davis v. United States, 328 U.S. 582 (1946)	7
Johnson v. Zerbst, 304 U.S. 458 (1938)	9
Jones v. United States, 357 U.S. 493 (1958)	7
Katz v. United States, 389 U.S. 347 (1967)	7
Mapp v. Ohio, 367 U.S. 643 (1961)	7
Miranda v. Arizona, 384 U.S. 436 (1966)	*passim*
Ohio v. Robinette, 519 U.S. 33 (1996)	9
Schmerber v. California, 384 U.S. 757 (1966)	7
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	*passim*
Swisher v. Virginia, 506 S.E.2d 763 (Va. 1998)	1
Tukes v. Dugger, 911 F.2d 508 (11th Cir. 1990), *cert. denied*, 502 U.S. 898 (1991)	13
United States v. Barnett, 989 F.2d 546 (1993), *amended* (Apr. 7, 1993), *amended* (1st Cir. Apr. 16, 1993), *cert. denied*, 510 U.S. 850 (1993)	13, 16
United States v. Blakeney, 942 F.2d 1001 (6th Cir.), *cert. denied*, 506 U.S. 990 (1992)	13
United States v. Calandra, 414 U.S. 338 (1974)	14
United States v. Chaidez, 906 F.2d 377 (8th Cir. 1990)	13
United States v. Chan-Jimenez, 125 F.3d 1324 (9th Cir. 1997)	16
United States v. Duran, 957 F.2d 499 (7th Cir. 1992)	12
United States v. Fernandez, 18 F.3d 874 (10th Cir. 1994)	11
United States v. Garfio-Chavez, 162 F.3d 1165, 1998 WL 416815 (8th Cir. 1998)	15
United States v. Kozinski, 16 F.3d 795 (7th Cir. 1994)	16
United States v. Mendenhall, 446 U.S. 544 (1980)	13
United States v. Riley, 968 F.2d 422 (5th Cir.), *cert. denied*, 506 U.S. 990 (1992)	13
United States v. Ross, No. 91-5151, 1992 U.S. App. LEXIS 1318 (4th Cir. Feb. 4, 1992)	13, 16

TABLE OF AUTHORITIES—Continued

Page

United States v. Sanchez, 635 F.2d 47 (2d Cir. 1980) 16
United States v. Watson, 423 U.S. 411 (1976) ..... *passim*
Vale v. Louisiana, 399 U.S. 30 (1970) 7

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. IV ..... *passim*
U.S. CONST. amend. XIV ..... *passim*

STATUTE

28 U.S.C. § 1257(a) (1994) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. ———

BOBBY WAYNE SWISHER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

---

PETITION FOR WRIT OF CERTIORARI

Petitioner Bobby Wayne Swisher respectfully petitions the Court for a writ of certiorari to review the decision of the Virginia Supreme Court.

OPINIONS BELOW

The Virginia Supreme Court's opinion affirming the conviction and sentence of Petitioner is reported at 506 S.E.2d 763 (Va. 1998) (App. A).[1] The Virginia Supreme Court's denial of Petitioner's motion for rehearing is unreported (App. B). The district court's oral decisions in response to Petitioner's suppression motions are unreported (App. C).

---

[1] "App." refers to the Appendices to this Petition.

JURISDICTION

On October 30, 1997, a jury in the Circuit Court for Augusta County, Virginia convicted Petitioner of capital murder and related charges. Petitioner was sentenced to death on the capital murder conviction. The Virginia Supreme Court's opinion affirming Petitioner's conviction of capital murder and sentence of death was entered on November 6, 1998 (App. A). The Virginia Supreme Court denied the petition for rehearing on January 8, 1999 (App. B). On March 9, 1999, this Court granted an extension of time for Petitioner to file this petition for a writ of certiorari until May 7, 1999 (App. D).

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (1994).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment of the U.S. Constitution, which provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

and the Fourteenth Amendment of the U.S. Constitution, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

A. Statement Of Facts[2]

On February 21, 1997, Dawn Snyder's body was found in a field in Stuarts Draft, Virginia (J.A. 906-07). On

---

[2] The facts set forth in this section are taken from the Joint Appendix ("J.A.") filed with the Virginia Supreme Court.

February 22, two young men alleged that Petitioner, then twenty years old, had admitted to killing Ms. Snyder (J.A. 1009). At approximately 9:00 p.m. the next day, four police officers from the Augusta County Sheriff's Department went to Petition's home to question him (J.A. 411, 520).

Petitioner had been drinking alcohol all day long and had passed out in his bed (J.A. 491). At 9:15 p.m., the officers roused Petitioner from his bed by yelling his name (J.A. 486). Two officers came in through the front door to Petitioner's room, while two others came in through the back entry (J.A. 412, 520). The deputies testified that they asked Petitioner to accompany them back to the station house (J.A. 522). The deputies then handcuffed Petitioner's hands behind his back while they were in the bedroom, and led him to the patrol car (J.A. 416, 522). The officers claimed that they informed Petitioner that he was not under arrest and that the handcuffs were necessary as a "precautionary measure" (J.A. 412).

One of the officers noticed Petitioner's coat lying on a piece of furniture, and suggested that Petitioner take the jacket with him because it was cool outside (J.A. 455-56). The officer then handed Petitioner his jacket so he could wear it to the police station (J.A. 456).

Upon reaching the police station at approximately 10:15 p.m., Petitioner was taken to a small conference room and questioned by three police officers (J.A. 418). This interrogation lasted almost two hours or until shortly after midnight (J.A. 420). Petitioner was not informed of his *Miranda* rights throughout this two-hour interrogation (J.A. 420).

At one point during the questioning, Petitioner's mother called into the station (J.A. 414). Petitioner asked to speak with her, but was told he had to wait until the

officers finished their interrogation (J.A. 414). One investigator testified that he warned Petitioner, "I said, once we are finished, you will be allowed to call your mother" (J.A. 421). Petitioner attempted at one point to leave but at least one officer blocked his path (J.A. 493).[3]

During the interrogation, officers told Petitioner that they "wanted to test his coat to see if [they] could determine whether there was any blood on it or not" (J.A. 456). The officers testified that Petitioner replied "go ahead,"[4] and that Petitioner stated he did not "know anything about what [they were] talking about" (J.A. 456). Forty-five minutes to an hour after Petitioner arrived at the police station, a Luminol[5] test was performed on his jacket (J.A. 499, 456). The police then told Petitioner that there was a "positive reaction," and that they were going to take possession of the coat and send it to the forensics laboratory for further testing (J.A. 456-57, 499). The officers testified that, in response, Petitioner said "he really didn't care, [the police] could take it" (J.A. 525).

At the same time the Luminol test was being performed on the jacket, the officers continued to question Petitioner and to confront him with other pieces of evidence. They presented him with burned clothes and a pair of new tennis shoes that they obtained from a contemporaneous search of his home (J.A. 524). They photographed bruises and scratches on his body (J.A. 464). Finally, he was confronted with the two witnesses to whom he

---

[3] One of the police officers testified that no one blocked Petitioner from leaving the room (J.A. 498).

[4] Petitioner denies that he was asked for consent to test his jacket (J.A. 490-91).

[5] Luminol is a chemical that is used to test for bloodstains (J.A. 1032).

had allegedly confessed the day before (J.A. 526, 1004-05).

Police arrested Petitioner shortly after the confrontation with the two witnesses, at about 12:05 a.m., Monday, February 24 (J.A. 526). He was finally given *Miranda* warnings after his arrest, almost two hours after arriving at the police station (J.A. 414-15). At approximately 2:00 a.m., Petitioner was finger-printed and put in a jail cell (J.A. 440).

B. Constitutional Issues Raised

Prior to trial, Petitioner made a motion to suppress evidence against him, which included evidence related to the jacket and the bloodstains on the jacket, arguing that the evidence was obtained in violation of the Fourth and Fourteenth Amendments (App. E). The trial court denied the motion, finding that Petitioner consented to any searches that took place (App. C at 26a-27a). In so holding, the court found that the question of whether Petitioner was in custody from the time he was taken from his uncles' house to the time police administered *Miranda* warnings was not "significant at this point because there had been no statements taken from him in that interim . . ." (App. C at 27a). Earlier, the court similarly noted that whether Petitioner was in custody was "not an issue in this case because . . . no evidence was obtained during this period of time . . ." (App. C at 24a).

On appeal to the Virginia Supreme Court, Petitioner argued that the trial court erred in failing to suppress evidence against him because it was obtained in violation of the Fourth and Fourteenth Amendments (App. F at 34a-35a). The Virginia Supreme Court rejected Petitioner's contention, ruling that the evidence in the record supported the trial court's ruling that Petitioner's consent to any police searches was voluntary (App. A at 13a-14a).

REASONS FOR GRANTING THE WRIT

This case presents an important and timely question regarding the scope of protection afforded citizens under the Fourth and Fourteenth Amendments.

I. A "KNOWING AND INTELLIGENT WAIVER" STANDARD SHOULD BE APPLIED TO DETERMINE WHETHER CONSENT GIVEN BY AN INDIVIDUAL IN CUSTODY AT A POLICE STATION IS VOLUNTARY

There is no dispute that Petitioner was handcuffed, brought to the police station and questioned for over two hours by three police officers without *Miranda* warnings, and that key evidence in this case—his jacket and bloodstains on the jacket—was obtained from Petitioner during this period (J.A. 455-56). Further, there is no evidence that Petitioner was informed that he could refuse consent or otherwise knew of this right when the police officers told him they were going to test, and later seize, his jacket (J.A. 456, 525).

Accordingly, this case squarely presents an important Fourth Amendment question that has never been addressed by this Court: whether consent to search can be voluntary when such consent is given by an individual, in custody at a police station, who has not given a "knowing and intelligent" waiver of his Fourth Amendment rights. This Court should grant Petitioner's writ of certiorari to review this important question of federal law.

A. *Schneckloth* And *Watson* Left Open This Important Question Of Federal Law

The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

shall not be violated . . . ." U.S. Const. amend. IV.[6] The Fourth Amendment thus functions "to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966). Based upon these guarantees, this Court has ruled that, subject to a few specifically established and well-drawn exceptions, physical evidence shall not be taken from a person or a person's home without a justifiable search warrant issued upon probable cause. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *United States v. Watson*, 423 U.S. 411, 427 (1976) ("There is no more basic constitutional rule in the Fourth Amendment area than that which makes a warrantless search unreasonable except in a few 'jealously and carefully drawn' exceptional circumstances.") (J. Powell, concurring opinion) (citing and quoting *Jones v. United States*, 357 U.S. 493, 499 (1958)).

Pursuant to one of the few established exceptions to the warrant requirement, the state may conduct a warrantless search with the consent of the suspect. *Davis v. United States*, 328 U.S. 582 (1946). In particular, this Court has stated that "a search conducted pursuant to a valid consent is constitutionally permissible." *Schneckloth*, 412 U.S. at 222; *see also Katz v. United States*, 389 U.S. 347, 358 (1967); *Vale v. Louisiana*, 399 U.S. 30, 34-35 (1970). In order for such a search to be valid, however, the state must show, by a preponderance of the evidence and through "clear and positive testimony," that consent was "freely and voluntarily given" and was not "the product of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 222, 226; *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

---

[6] The Fourth Amendment is applicable to the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961).

The *Schneckloth* Court discussed circumstances under which consent could be considered voluntary. *Schneckloth*, 412 U.S. at 226. The Court concluded that, when consent to search is obtained during the course of a routine traffic stop on a public highway, the suspect's knowledge of the right to refuse consent was *not* a prerequisite to establishing voluntary consent. *Id.* at 227. The Court acknowledged that the "on-the-scene" questioning in *Schneckloth* was "far removed" from the more troubling circumstances in which consent to search was purportedly obtained "after [a suspect] has been placed in custody," as Petitioner was in this case.[7] *Id.* at 232, 240 n.29. In these circumstances, the Court noted, lower courts have been "particularly sensitive to the heightened possibilities for coercion." *Id.* at 240 n.29. The Court further distinguished the circumstances of the *Schneckloth* case from the in-custody interrogation present in our case as follows:

> Consent searches . . . normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions . . . . These situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial rights. And, while surely a closer question, these situations are still immeasurably, far removed from 'custodial interrogation' where, in *Miranda v. Arizona, supra*, we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation.

Id. at 231-32 (citation omitted).

Therefore, the *Schneckloth* Court left open the question of whether a "knowing and intelligent" waiver standard

---

[7] As noted above, the trial court as factfinder assumed that Petitioner was in custody but found that fact to be irrelevant to Petitioner's motions to suppress (App. C at 24a, 27a).

would be required to ensure voluntary consent when a search took place during in-custody interrogations. *Id.* In an earlier case, this Court explained that, under such a standard, the State would have the burden to demonstrate "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The State could fulfill its burden by establishing that an individual was informed of his right to refuse consent or otherwise knew of this right before consent to search was given.[8]

Three years later, the *Watson* Court partially answered this question, finding voluntary consent even though an in-custody defendant was not informed of his right to refuse consent. The Court, however, specifically noted that the defendant's consent had been "given while on a public street, not in the confines of the police station." *Watson*, 423 U.S. at 424. Accordingly, the question remains whether the Fourth Amendment requires a heightened standard for consent when a search is conducted on an in-custody defendant at a police station, as occurred in this case.[9] Petitioner respectfully contends that the

---

[8] It is undisputed that no such evidence was presented in this case (J.A. 417-18, 456, 525).

[9] This Court's decision in *Robinette* does not resolve this question. *Ohio v. Robinette*, 519 U.S. 33 (1996). In *Robinette*, a defendant detained at a traffic stop consented to a search of his car. *Id.* at 35. He was not clearly informed that he was "free to go" before he consented, and was eventually found guilty on various drug possession charges. *Id.* On certiorari, this Court was presented with the question of "whether the Fourth Amendment requires that a lawfully seized defendant must be advised that he is 'free to go' before his consent to search will be recognized as voluntary." *Id.* The *Robinette* Court rejected such a rule. *Id.* In doing so, it reiterated *Schneckloth*'s holding that declined to adopt a per se rule requiring the prosecution to establish knowledge of the right to refuse consent as a prerequisite to establishing voluntary consent for a search conducted on a seized, rather than an

Constitution mandates such a "knowing and intelligent" waiver.

B. This Court Has Historically Recognized That There Is Compulsion Inherent In Police-Dominated Custodial Interrogations And Therefore Constitutional Safeguards Are Required

As this Court readily acknowledged in *Miranda*, the potential for coercion during an in-custody interrogation at a police station is great. *Miranda v. Arizona*, 384 U.S. 436 (1966). Such an environment, where examinations take place in a police-dominated, isolated and often unfamiliar atmosphere, can be both physically and, more typical in modern practice, psychologically oppressive. *Id.* at 447. "[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Id.* at 455. Without proper safeguards, this Court recognized, the process of in-custody interrogation of persons suspected or accused of a crime contains inherently compelling pressure which effectively undermines the individual's ability to make a free and rational choice. *Id.* at 467.

The interrogation practices and coercive behaviors that place a defendant in an unfamiliar and intimidating atmosphere do not vary depending upon whether the defendant claims a violation of his Fourth or Fifth Amendment rights. Thus, the compelling pressures noted in *Miranda* necessarily exist regardless of the constitutional rights in question. Moreover, the *Schneckloth* Court itself recognized that constitutional protections during such in-

---

in-custody, defendant. *Id.* at 39 (citing *Schneckloth*, 412 U.S. at 227). The *Robinette* Court, however, went no further than the *Schneckloth* Court on the facts or the law. *Id.* Accordingly, the question of whether the Fourth Amendment requires a heightened standard for consent when the search in question takes place while the defendant is in custody *at a police station* remains unanswered.

terrogations were necessary *to protect the fairness of the trial itself*:

> That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding process. The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process.

Schneckloth, 412 U.S. at 240. The *Schneckloth* Court thus recognized that the " 'evils in the interrogation process,' " rather than the constitutional right in question, was the key factor in determining that a "knowing and intelligent" waiver standard was necessary in the *Miranda* case.[10] *Id.* (citing and quoting *Miranda*, 384 U.S. at 466). Likewise, the integrity of the fact-finding process would suffer greatly if police obtained *physical evidence*, rather than statements, from an in-custody defendant interrogated at a police station without the protection of a "knowing and intelligent" waiver standard. Accordingly, constitutional safeguards similar to those required in *Miranda* to protect Fifth Amendment rights should be required for consent searches conducted on in-custody defendants at the police station to protect equally important Fourth Amendment rights.[11]

---

[10] The *Schneckloth* Court also recognized that its rationale for rejecting Fourth Amendment warnings under the facts of that case—because "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning"—did not extend to situations where the defendant was in custody, as *Miranda* imposed just such a rule in the Fifth Amendment context. *Schneckloth*, 412 U.S. at 231-32.

[11] Moreover, some courts already emphasize knowledge of the right to refuse consent in analyzing all Fourth Amendment consensual searches. *See, e.g., United States v. Fernandez*, 18 F.3d 874,

C. The Circuit Courts Have Applied Conflicting Standards To Determine Whether An Individual Has Given Voluntary Consent When In Custody At A Police Station

There has been confusion among the circuit courts regarding the proper standard to apply to determine whether a defendant, in custody at a police station, has given voluntary consent for a search. Recognizing the "compulsion inherent in custodial surroundings," *Miranda*, 384 U.S. at 458, and the additional potential for coercion when an in-custody search takes place out of the public eye and in a private location such as a police station, at least three circuit courts have considered whether the defendant was in a police station in determining the voluntariness of a search. For example, the Seventh Circuit found that the fact that a young woman was being held in custody at a police station when her consent to search was given was a *substantial factor* to consider in assessing the overall voluntariness of her consent. *United States v. Duran*, 957 F.2d 499, 503 (7th Cir. 1992). The Court eventually determined that her consent was valid, however, noting that the potentially coercive effect of her custody was mitigated by the fact that she was arrested during the day, without a show of force, was not kept under close restraint at the police station, and was not aggressively interrogated. *Id.* at 503. Similarly, the Fifth Circuit considered the fact that defendant consented to a search in the familiar surroundings of his home, rather than at the police station, in determining that his consent

---

882 (10th Cir. 1994) ("Although informing a defendant of his right to refuse consent is not a prerequisite to establishing voluntary consent, we consider it a factor 'particularly worth noting.'") (citation omitted); *Duran*, 957 F.2d at 503 ("In light of all the circumstances—particularly the fact that the police informed Karen of her right to refuse consent—we cannot say that the district court's ruling on this matter was erroneous. . . .").

was voluntary. *United States v. Riley*, 968 F.2d 422, 426 (5th Cir.), *cert. denied*, 506 U.S. 990 (1992). Likewise, in upholding the trial court's finding of voluntariness under the Fourth Amendment, the Sixth Circuit emphasized the fact that defendant was not searched at a police station but rather at his home. *United States v. Blakeney*, 942 F.2d 1001, 1016 (6th Cir.), *cert. denied*, 506 U.S. 990 (1992); *cf. United States v. Mendenhall*, 446 U.S. 544, 559 (1980) (emphasizing, in upholding the validity of consent, that defendant's presence in the police office was voluntary); *see also United States v. Ross*, No. 91-5151, 1992 U.S. App. LEXIS 1318, at *9 (4th Cir. Feb. 4, 1992) (citing *Watson* in support of the contention that a court should consider whether the defendant was in a public or secluded place when determining the validity of a Fourth Amendment consensual search); *United States v. Chaidez*, 906 F.2d 377, 381 (8th Cir. 1990) (same).

Other circuit courts are silent on the question of whether the fact that a consent to search takes place in a police station should be considered in assessing voluntariness under the Fourth Amendment. *See, e.g., United States v. Barnett*, 989 F.2d 546, 555 (1993), *amended* (Apr. 7, 1993), *amended* (1st Cir. Apr. 16, 1993), *cert. denied*, 510 U.S. 850 (1993); *Tukes v. Dugger*, 911 F.2d 508, 517 (11th Cir. 1990), *cert. denied*, 502 U.S. 898 (1991).

It is apparent from this inventory of case law that lower courts are not applying a uniform standard when analyzing the constitutionality of a search conducted on an individual who is in custody at a police station. This confusion, moreover, does not present merely a theoretical question in conducting Fourth Amendment searches. Without an unambiguous standard to determine free and volun-

tary consent, the rationale behind the Fourth Amendment's exclusionary rule—to deter police officers from conducting unconstitutional searches by suppressing evidence collected as a result of such actions [12]—loses any coherence and the rule itself is made ineffective. Indeed, a rule can only effectively deter behavior if the standard applied is unmistakable in the minds of those individuals regulated by the rule.

As demonstrated above, the standard applied to consensual searches conducted on an individual who is in custody at a police station is far from clear. Moreover, this Court has long-recognized the coercion inherent in police-dominated custodial interrogations, and the need for constitutional safeguards such as a "knowing and intelligent" waiver to protect against the compelling pressures found in such examinations. *Miranda*, 384 U.S. at 467. This coercion exists regardless of whether the police are attempting to obtain physical evidence or a statement from the individual, and thus regardless of whether the individual is asserting his Fourth or Fifth Amendment rights. Therefore, this Court should grant Petitioner's petition for writ of certiorari to clarify the standard that should be applied to determine the voluntariness of a search conducted on an individual who is in custody at a police station.

---

[12] The rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974) (footnote omitted).

II. IN ANY EVENT, THE TRIAL COURT VIOLATED THIS COURT'S SETTLED FOURTH AMENDMENT PRECEDENT BY FAILING TO CONSIDER WHETHER PETITIONER WAS IN CUSTODY IN DETERMINING THE VOLUNTARINESS OF HIS CONSENT

As explained above, police obtained access to Petitioner's jacket when he was in custody at the police station. The trial court denied Petitioner's motion to suppress the jacket and the bloodstains on the jacket, finding that he consented to any searches that took place (App. C at 26a-27a). In so holding, the court found that the question of whether Petitioner was in custody from the time he was taken from his uncles' house to the time police administered *Miranda* warnings was not "significant at this point because there had been no statements taken from him in that interim . . ." (App. C at 27a). Earlier, the court similarly noted that whether Petitioner was in custody was "not an issue in this case because . . . no evidence was obtained during this period of time . . ." (App. C at 24a).

The trial court, however, plainly violated settled Fourth Amendment precedent by failing to consider the fact that Petitioner was in custody at the time the alleged consent to search was given. As noted in Section IA above, while in *Schneckloth* and *Watson* the Court left open the question of whether knowledge of the right to refuse consent is a prerequisite to establishing voluntary consent when a defendant is in custody at a police station, the Court certainly recognized that whether a defendant is *in custody at all* is a significant factor to consider in determining the overall voluntariness of a consent to search. *Schneckloth*, 412 U.S. at 241-42; *Watson*, 423 U.S. at 424. Moreover, many circuit courts have acknowledged this settled precedent. *See, e.g., United*

States v. Garfio-Chavez, 162 F.3d 1165, 1998 WL 416815, at *3 (8th Cir. 1998) (noting that the court should consider factors such as whether the defendant was in custody or under arrest when consent was given); *United States v. Chan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir. 1997) (finding that the factors to be considered in determining voluntariness include whether the defendant was in custody); *United States v. Kozinski*, 16 F.3d 795, 810 (7th Cir. 1994) (holding that the factors to be considered in determining whether defendant consented to a search included whether he was in custody); *Barnett*, 989 F.2d at 555 (finding that sensitivity to the heightened possibility of coercion is appropriate when a defendant's consent is obtained when in custody); *Ross*, 1992 U.S. App. LEXIS 1318, at *9 (noting that the court should consider whether the defendant was arrested or in custody in assessing the voluntariness of consent); *United States v. Sanchez*, 635 F.2d 47, 58 (2d Cir. 1980) ("When the claimed consent has been given by a person in custody it is appropriate to be 'particularly sensitive to the heightened possibilities for coercion . . . .'"). Accordingly, because the trial court did not consider this important factor, its denial of Petitioner's motion to suppress clearly violated Petitioner's constitutional rights.

CONCLUSION

In order to settle the important question of federal law raised by this case, this Court should grant certiorari to review the decision of the Virginia Supreme Court.

Respectfully submitted,

BARBARA K. KAGAN
Counsel of Record
LINDA S. STEIN
L. MATTHEW QUIGLEY
MELINEH B. BLACKWELL
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
(202) 429-3000
Counsel for Bobby Wayne Swisher